No. 87-107

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BRENDA PATTERSON,

Petitioner,

—against—

McLEAN CREDIT UNION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF *AMICUS CURIAE* OF ERIC FONER, JOHN H. FRANKLIN, LOUIS R. HARLAN, STANLEY N. KATZ, LEON F. LITWACK, C. VANN WOODWARD AND MARY FRANCES BERRY

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CONSENT OF PARTIES

Petitioner and respondent have consented to the filing of this brief, *amicus curiae*, see Appendix A.

AMICI'S STATEMENT OF INTEREST

This brief, *amicus curiae*, is submitted, pursuant to Sup. Ct. R. 36, on behalf of the above-named historians who respectfully urge the Court not to reconsider the interpretation of 42 U.S.C. § 1981 adopted in *Runyon v. McCrary*, 427 U.S. 160, 96 S. Ct. 2586 (1976). The events leading up to, and surrounding passage and enforcement of, the Civil Rights Act of 1866 ("the Act") clearly establish that the holding in *Runyon* was correct. The Act was an express recognition by Congress of the need for the federal government, and its courts, to protect against violations of the civil rights of all Americans, black or white, regardless of whether the offender be a private individual, state official or a discriminatory state statute or local ordinance.

The issue before the Court in *Runyon* and now before this Court requires ascertaining congressional intent regarding matters that transpired more than 120 years ago. The *Amici* are historians who have devoted much of their professional lives to the study of race relations, the Civil War and the period of Reconstruction that followed the Civil War.[1] As historians, it is their function to discover and explain historical facts and put them in their proper context. Accordingly, the *Amici* are well qualified to provide the Court with a somewhat broader historical context and perspective for construction of the Act. Murphy, *Time to Reclaim: The Current Challenge of American Constitutional History*, 64 Am. Hist. Rev. 64 (1963).

SUMMARY OF ARGUMENT

The broad sweep of protection offered by the Act can only be fully appreciated if the statute is examined within its full historical context. The context cannot be limited to statements made in Congress; rather it includes (1) the nature and scope of the problems facing the newly emancipated blacks and their white supporters which the Reconstruction Congress intended to remedy; (2) the expansive constitutional theory of civil rights enforcement on which the Act was based; (3) the statute's own broad enforcement provisions; and (4) the manner in which the statute was implemented and understood by the federal judges and legal officers who enforced the Act in the 1860's and 1870's.[2]

This examination will show that *Runyon* was decided correctly. It will conclusively demonstrate that the Act was intended by its framers—and so used by those charged with its implementation—to protect the civil rights of both blacks and whites, notwithstanding whether the source of a civil rights violation was a private individual, a state official or a discriminatory state statute or local ordinance.

Congress fully understood that it was confronting pervasive prejudice among private individuals and state officials, as much as discriminatory laws enacted by the Southern states. The framers further recognized that white federal officials and Southern unionists, as much as blacks, required protection. Congress responded to these needs by conferring primary civil and criminal jurisdiction on the federal courts to enforce civil rights in cases involving private individuals and state officials.

It is historically inaccurate to superimpose the modern state action/private discrimination dichotomy upon the Reconstruction Congress' deliberations on the Act. The framers of the Act viewed the thirteenth amendment, on which the statute is based, as affording ample constitutional authority to legislate against violations of those civil rights guaranteed by United States citizenship irrespective of the offender's status.

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1 Biographical sketches of *Amici* are set forth in Appendix B.

2 The Court has not previously considered the history of civil rights enforcement during Reconstruction. The most comprehensive study of this subject is R. Kaczorowski, *The Politics of Judicial Interpretation: The Federal Courts, Department of Justice and Civil Rights 1866-1876* (1985) (hereafter cited as "*Politics of Judicial Interpretation*").

ARGUMENT

I. THE ACT WAS THE RECONSTRUCTION CONGRESS' RESPONSE TO THE POST-WAR PLIGHT OF BLACKS AND THEIR WHITE SUPPORTERS WHO FACED VIOLENCE AND HARASSMENT BY PRIVATE INDIVIDUALS AND DISCRIMINATION IN STATE COURTS

A sizeable number of Southern whites rejected the Union's victory and the principals for which that victory stood. Many of these individuals retained significant local, if not state-wide or regional, economic and political power following the Civil War. Their expressions of defiance took many forms and were the precipitating factors leading to enactment of the Act and later, the fourteenth amendment.

A. A Systemic Pattern of Violence

Southern whites who rejected the Union's victory expressed their defiance, in part, through violent assaults against the freedmen, white unionists and federal officers in the South.[5] Violence was often committed with impunity as local law officers refused to offer protection and prosecute offenders. The special Congressional Joint Committee on Reconstruction, *see* Report on Reconstruction (hereinafter cited as "Cong. Report"), I Cong. Globe, 39th Cong., 1st Sess. (1866), which held hearings on post-war conditions in the South, heard extensive testimony regarding the failure of local and state officials to enforce the criminal laws where the victim was black or viewed as a white unionist.[6]

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5 L. Litwack, *Been in the Storm So Long: The Aftermath of Slavery*, 221-91 (1979) (hereinafter cited as "Litwack, *Aftermath of Slavery*"); B. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. Rev. 863, 874-77 (1986); B. Kaczorowski, *To Begin the Nation Anew: Congress, Citizenship, and Civil Rights After the Civil War*, 92 Am. Hist. Rev. 45, 50-51 (1987).

6 *See also* Reports of Asst. Comm. of the Freedmen's Bureau, 1865-66, S. Exec. Doc. No. 27, 23, 39th Cong., 1st Sess. (1866); Freedmen's

Southern whites often used violence to reinstitute discipline and perpetuate a system of *de facto* slavery. Freedmen who expressed their newly acquired liberty by attempting to leave their former masters' plantations, by attempting to acquire property or by disputing labor settlements, were often assaulted and murdered. For example, the Joint Committee heard testimony about a private organization known as the "black cavalry" which forcibly returned to their original masters freedmen who had left for other employment and insured future compliance by whipping and flogging. Cong. Rep. at pt. i, 145. *See also* Litwack, *Aftermath Of Slavery*, at 274-78; Foner, *Reconstruction*, at 120-21, 131-32, 135-36.

Blacks also received similar punishment for perceived insolence and insubordination when they failed to be deferential to whites and abide by the etiquette of inferiority that had governed their behavior toward whites during slavery. *See* Litwack, *Aftermath of Slavery*, at 370-74. The use of violence against blacks as a means of social control and economic discipline was pervasive, as was the unwillingness of local authorities to prosecute whites for crimes against blacks. *See, e.g.*, Letter from Bvt. Maj. Gen. Clinton B. Fisk to Oliver O. Howard, Mar. 12, 1866, (Letters Rec'd by the Comm. of the Freedmen's Bureau, Ser. 15, Record Group 105, National Archives) (transmitting report of Mar. 5, 1866 of Peter Bonesteel of outrages in Eastern Kentucky).[7]

Blacks also met with violence from private individuals when they attempted to enforce their contractual rights or to acquire

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Affairs, S. Exec. Doc. No. 68, 39th Cong., 1st Sess. (1866); Murder of Black Soldiers, H.R. Rep. No. 23, 39th Cong., 2d Sess. (1866); E. Foner, *Reconstruction: America's Unfinished Revolution--1863-1877* (1988) (hereinafter cited as "Foner, *Reconstruction*"); Kaczorowski, 61 N.Y.U. L. Rev. at 874-75.

7 J. Franklin, *Reconstruction After the Civil War*, 51-52 (1961); Kaczorowski, 61 N.Y.U. L. Rev. at 874-75; Nieman, *To Set The Law in Motion: The Freedmen's Bureau and the Legal Rights of Blacks--1865-1868*, 126-32 (1979) (hereinafter cited as "Nieman, *Legal Rights of Blacks*").

property. These contractual "rights" were, more often than not, imposed on terms proposed by white employers who used violence and torture as a means of contract negotiations. In Virginia, for example, blacks were tied up by the thumbs if they did not agree to work for the price set by the landowners. Cong. Rep. at pt. ii, 55.

These acts of violence and terror, and the flat refusal of Southern whites, in and out of government, to acknowledge that blacks had any legal status or individual rights, formed the backdrop against which the Thirty-Ninth Congress acted.

B. Abuse of the Local Legal Process

Physical violence was not the only form of harassment in the post-war South. Southern whites who had supported the Union during the Civil War and federal officers who had sworn to uphold the rights of all citizens were subjected to private civil suits and to criminal prosecution for acts done under federal authority. For example, a Union general had civil and criminal charges filed against him in Kentucky in 1865 for "aiding slaves to escape." *I Freedom: A Documentary History of Emancipation–1861-1867*, 657-58 (Berlin ed. 1985).[9]

C. Economic and Social Reordering

The end of the Civil War and the abolition of slavery was the shorthand to a social and economic order which had existed for two centuries. A new order had to replace the old. Victorious Northerners attempted to secure emancipation as a practical reality by establishing their economic system of free labor based

9 *See also*, e.g., General Orders No. 3, Jan. 12, 1866, Adjutant General Office, reprinted in *The Political History of the United States of America During the Period of Reconstruction*, 122 (E. McPherson ed. 1875); Letter from T.J. Gridley to Lyman Trumbull, Jan. 8, 1866 (Lyman Trumbull Papers Library of Congress); Letter from George A. Crosby to Zachariah Chandler, Jan. 14, 1866 (Zachariah Chandler Papers); Letter from W.W. Trimble to John Sherman, Feb. 12, 1866 (John Sherman Papers Library of Congress); St. Louis *Daily Missouri Democrat*, Jan. 17, 1866; "The Reconstructed," *Rochester Democrat*, Feb. 13, 1866; 32 *Harper's* 808 (1866); Kaczorowski, 92 A.H.R. at 51.

on individual rights, particularly the rights to contract and to property, which relegated economic and social relationships to private ordering. Foner, *Reconstruction*, at 143-44. Southern white landowners, however, could not conceive of their former slaves as possessing any rights, especially the right to negotiate and contract with them concerning the terms of their employment on the basis of equality. *See, e.g.*, Howard, *Autobiography of Oliver Otis Howard*, 279 (1907); Letter from Samuel Thomas to O. Howard, Sept. 6, 1865, M-5 1865 (Letters Rec'd by the Comm. of the Freedmen's Bureau, Ser. 15, Record Group) 105 National Archives; Foner, *Reconstruction*, at 149-50. They often refused to enter labor contracts with freedmen.

The Joint Committee heard testimony that many former slaveholders objected to paying any wages at all and, at a minimum, balked at paying anything more than a fraction of the rate at which slaves had been rented before the war. Cong. Rep. at pt. ii, *passim*.

In addition to resorting to physical violence as a means of extorting contractual concessions, white landowners used a variety of economic tactics to require blacks to accept patently improper contract terms. Price fixing, lifetime contracts, exhorbitant rent and [illegible] charges that were equivalent to wages were among the choice tactics. Cong. Rep. at pt. ii, 228, pt. iii, 80. As the Congressional Report noted at pt. ii, 123: "There is a disposition on the part of [white] citizens to secure, as far as possible, the same control over the freedmen by contracts which [the whites] possessed when they held them as slaves." *See also* N.Y. Times, [illegible] 27, Aug. 1, 1865.

Freedmen, on the other hand, understandably were reluctant to enter into [illegible] contracts with landowners that were intended to reduce the freedmen to a condition of servitude. Into this social and economic chaos stepped agents of the Freedmen's Bureau [illegible] in 1865 and early 1866 acted as middlemen and tried to fix both landowners and freedmen to enter into equitable labor contracts. They also tried to enforce contracts on behalf of [illegible] the freedmen and the landowners. Nieman, *Legal Rights of Freedmen*, at 172-90. However, this effort was in-

sufficient as landowners often refused to honor the labor agreements they entered and local law enforcement agencies and courts usually refused to give the freedmen relief and to redress their rights.

D. The Black Codes

Southern white supremists also sought to reinstitute the discipline and social control over blacks that accompanied slavery with legislation referred to as the "Black Codes." These codes have, on occasion, been incorrectly cited as the focal point of the Act and, in turn, supportive of the notion that the Act was enacted solely to strike discriminatory state laws and secure equal protection under state law.

History does not support such a construction. Union military commanders and Freedman Bureau agents nullified the Black Codes adopted in 1865 and early 1866 and ordered federal officers to disregard them. J. Sefton, *The United States Army and Reconstruction–1865-1877*, 70-72, 90 (1967). Moreover, the Northern outcry against the Black Codes was so strong that by the time the Act was enacted, many of these codes had already been modified so that they were facially impartial. Foner, *Reconstruction*, at 201.

While the Black Codes were of some concern to the framers, they were by no means the central focus of the Act because their abolition would not have afforded protection of the freedmen and white unionists from the violence committed against them with impunity as local law enforcement officials refused to prosecute the offenders. Nor would the removal of legal disabilities protect citizens from the discriminatory manner in which state officials and judges enforced state law. Rather than the removal of legal disabilities, the primary need of Southern blacks and whites loyal to the Union was protection from the violence and harassment of private individuals within a system of civil and criminal justice through which they could enforce and redress their rights. *See* Letter from Sen. Lyman Trumbull to

Mrs. Gary, June 26, 1866 (Lyman Trumbull Papers Library of Congress); Kaczorowski, 61 N.Y.U. L. Rev. at 883-84.[7]

As the preceding sections sharply illustrate, white landowners and other individuals were a principal source of civil rights violations in the post-war South. It was, therefore, critical for any effective legislation to reach private individuals. Moreover, it was necessary to reach into the private sector to further the new economic order of free labor and free men for which Northern Republicans stood. *See* Foner, *Free Soil, Free Labor, Freemen: The Ideology of the Republican Party Before the Civil War* (1970).

E. The Reconstruction Congress was Aware of, and Responded to, this Pervasive Pattern of Private Discrimination Supported by Public Officials

The Republicans, who controlled both houses of Congress, were keenly aware of the need to provide an alternative system of civil and criminal justice in the South. The extensive hearings held by the Joint Committee on Reconstruction produced voluminous evidence of the physical and economic discrimination that the freedmen faced on all levels in their dealings with Southern whites.

In addition, correspondence of military officers and Freedmen's Bureau agents in the South, which documented the pervasive and frequently violent nature of the problem, were some of the materials the framers read into the record of legislative debates. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 1759 (1866) (Sen. Trumbull). Senator Lyman Trumbull, author of the Civil Rights Act of 1866, spent several nights at Freedmen's Bureau headquarters examining letters and reports of Bureau

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7 That racially discriminatory laws were not the sole problem prompting the enactment of civil rights legislation in 1866 is further reflected by the Joint Committee hearings on Reconstruction which served as a foundation for congressional action in 1866. The testimony heard did not focus on racially discriminatory laws or even discriminatory legal process; rather, the focus was on the abuses by private white landowners.

agents concerning the problem touched upon in this brief. The Senator also conferred with the Commissioner of the Freedmen's Bureau, General Oliver O. Howard, who urged that legislation provide the freedmen with an alternative system of justice such as that provided by the Act.[9]

Members in the House were also well aware of these problems. When Congressman James F. Wilson, the House floor manager of the Civil Rights Act, introduced it in the House, he exhorted that, inasmuch as the states were failing to protect the personal rights of many Americans, "we must do our duty by supplying the protection which the states deny." Cong. Globe, 39th Cong., 1st Sess. 1118 (1866).

Republicans felt compelled to provide effective federal guarantees of civil rights. *See, e.g., id.* at 605, 1759 (Sen. Trumbull); *id.* at 1118, 1295-95 (Cong. Wilson). Because Southern whites refused to accept the outcome of the Civil War, Republicans believed that effective civil rights legislation was imperative to preserve and reinforce the principals of national sovereignty and emancipation for which the Unionists had fought and sacrificed. The Act, and later the fourteenth amendment, were the Republicans' expression in law of their military victory in the Civil War. *Id.* app. at 99 (Sen. Yates); *id.* at 1034, 1090 (Cong. Bingham); *id.* at 1262-63 (Cong. Broomall); *id.* at 1832, 1836 (Cong. Lawrence); The Philadelphia American, reprinted in *Scrapbook on the Fourteenth Amendment*, 41 (E. McPherson ed. n.d.) (Edward McPherson Papers, Library of Congress). When viewed from this historical perspective, it is indisputable that the Act was intended to reach private as well as official conduct.

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9 *See, e.g.*, Howard, *Autobiography* at 208-09; Letter from O. Howard to Senator Henry Wilson, Nov. 25, 1865 (O. Howard Papers Bowdoin College Library); Letter from Lyman Trumbull to O. Howard, Jan. 4, 1866; Letter from O. Howard to Lyman Trumbull, Feb. 8, 1866; Letter from O. Howard to J.R. Chapin, Jan. 6, 1866; (Lyman Trumbull Papers Library of Congress); Nieman, *Legal Rights of Blacks*, at 106.

II. IT IS HISTORICALLY INACCURATE TO READ INTO THE LEGISLATIVE HISTORY OF THE ACT THE STATE ACTION/PRIVATE DISCRIMINATION DICHOTOMY OF OUR TIMES

In 1866, Congress did not address the issue of whether national civil rights enforcement should extend to private individuals or be limited to striking discriminatory state laws or practices. That is because the framers did not recognize the modern "state action doctrine" as a possible (or, facing the problems they faced, an acceptable) limitation on their power to redress civil rights violations. The framers believed that Congress had authority under the thirteenth amendment to protect the civil rights of all Americans regardless of the source of the violation.

A. Congress Viewed the Thirteenth Amendment, Pursuant to which the Act was Enacted, as Protecting All Americans from Violation of Their Civil Rights Regardless of the Source of the Violation

Congressional proponents of the Act understood that the thirteenth amendment delegated authority to Congress to secure civil rights. Given their expansive view of their constitutional power to redress wrongs in this area, two points become evident: (1) the Act was intended to reach private discrimination and (2) Congress did not recognize the modern state action/private discrimination dichotomy.

The framers' theory of the thirteenth amendment was much broader than the "badges of slavery" concept expressed by the Court in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 88 S. Ct. 2186 (1968). Imbued with a Hamiltonian conception of constitutional interpretation that was expressed by the Supreme Court under John Marshall in cases such as *McCulloch v. Maryland*, 17 U.S. 316 (1819), on which they relied as authority, *see* Cong. Globe, 39th Cong., 1st Sess., 1118 (1866) (Cong. Wilson), the framers interpreted the thirteenth amendment's negative prohibition of slavery as an *affirmative guarantee of liberty to all Americans*. Thus, when Senator Trumbull intro-

duced his civil rights bill to the Senate, he explained that the thirteenth amendment

> declared that all persons in the United States should be free. This measure is intended to give effect to that declaration and secure to all persons within the United States practical freedom.

Id. at 474.

Trumbull and Republicans generally in both Houses of Congress interpreted the liberty guaranteed by the thirteenth amendment to include the rights to life, liberty and property and all rights incident thereto. *Id.* at 1780-81 (1866) (Sen. Trumbull).[9] Congress equated this status and these rights to the status and rights of United States citizenship. (See sources cited in footnote 6.) Congress believed that an exact enumeration of the specific rights which were incident of these generic rights was impossible. Nonetheless, Section one of the Act provides some illustration of the specific rights involved. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 1293 (1866) (Cong. Shellabarger). These rights included the economic rights to contract and to property, the means of enforcing them in the courts, and the right to governmental protection of persons and property.

Consequently, the framers of the Act understood United States citizenship to be primary in the sense that the fundamental rights of Americans were recognized and secured by the Constitution and, with the Act, the laws of the United States. Significantly, the framers considered state citizenship to be subordinate to, and derivative of, United States citizenship. *See,*

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9 *Id.* at 503-04 (Sen. Howard); *id.* at 570 (Sen. Morrill); *id.* at 602, 761 (Senator Lane); *id.* at 1295 (Sen. Wilson); *id.* app. at 101 (Sen. Yates); *id.* at 1118 (Cong. Wilson); *id.* at 1124 (Cong. Cook); *id.* at 1151-52 (Cong. Thayer); *id.* at 1156-57 (Cong. Thornton); *id.* app. at 158 (Cong. Delano). *See also* Letter from A. Nicolay to Lyman Trumbull, Feb. 25, 1866, at 4, col. 2 (Lyman Trumbull Papers Library of Congress); Baltimore American, Mar. 23, 1866, collected in *Speeches on the Civil Rights Bill* 4 (E. McPherson ed. n.d.) (Edward McPherson Papers Library of Congress). For additional authority, *see* Kaczorowski, 61 N.Y.U. L. Rev. at 898-99, n.156.

e.g., Cong. Globe, 39th Cong., 1st Sess. 1120 (1866) (Cong. Wilson). The Act was intended to secure these civil rights to all United States citizens and to protect them from disenfranchisement of their fundamental rights as citizens regardless of the nature or source—public or private—of violation.

B. Congress Did Not Recognize a Limitation on Its Power to Legislate Against Civil Rights Violations Committed by Private Persons

The difficulty modern scholars have had in understanding the framers' intention to reach private discrimination is due in significant part to modern notions of "state action." The framers did not think in these terms.

Congress did not question their authority to redress wrongs committed by private citizens that infringe on those rights. As Senator Trumbull declared: "The right to punish persons who violate the laws of the United States cannot be questioned." Cong. Globe, 39th Cong., 1st Sess. 1759 (1866) (Sen. Trumbull); *see also id.* at 475. Congress recognized that prosecuting community leaders, both private and governmental, who violated civil rights was an effective way to eliminate the flagrant racial prejudice that was endemic to the South during this period. Thus, Senator Trumbull stated:

> When it comes to be understood in all parts of the United States that any person who shall deprive another of any right or subject him to any punishment in consequence of his color or race will expose himself to fine and imprisonment, I think such acts will soon cease. I think it will only be necessary to go into the late slaveholding States and subject to fine and imprisonment one or two in a State, and the most prominent ones I should hope at that, to break up this whole business.

Cong. Globe, 39th Cong., 1st Sess. 475 (1866) (Sen. Trumbull).[10]

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10 The framers decided, however, to criminalize only civil rights violations committed under color of law or custom to preserve state jurisdiction over ordinary crimes. *Id.* at 1758 (Sen. Trumbull).

III. CONGRESS INTENDED THE ACT TO DISPLACE STATE LAW TO THE EXTENT NECESSARY TO PROTECT THE CIVIL RIGHTS OF ALL CITIZENS, NOT MERELY TO PROVIDE EQUAL RIGHTS UNDER STATE LAW

A. Section One, 14 U.S. Stat. § 27 (1866), Guaranteed All Citizens Civil Rights Independent of State Law

Section one of the Act, 14 U.S. Stat. § 27 (1866), supplanted state laws in three important respects. First, it supplanted state statutes relating to citizenship to the extent that it conferred citizenship on all persons born or naturalized in the United States and not subject to any foreign power (except for Indians not taxed). States no longer could deny the status of citizen to such persons.

Second, it extended to all United States citizens the rights specifically enumerated therein. As Senator Trumbull declared:

> To be a citizen of the United States carries with it some rights; and what are they? They are those inherent, fundamental rights which belong to free citizens or free men in all countries, such as the rights enumerated in this bill, and they belong to them in all the states of the union.

Cong. Globe, 39th Cong. 1st Sess. 1757 (1866).

The significance of this is that, pursuant to Section one, United States citizens possessed these rights independent of state law. That is, the statute gave all United States citizens a cause of action to enforce their civil rights. The thirteenth amendment authorized Congress to enact legislation "to allow [the freedmen] to come to the federal courts in all cases" if that was required to secure their civil rights. *Id.* at 1759.

Third, Section one guaranteed that all United States citizens shall enjoy the rights secured by Section one on the same basis as white citizens, the most favored citizens in this regard. To the extent that states recognized and regulated the exercise of these rights, they were required to extend to all citizens the regulations they provided for the civil rights of white citizens.[11] However, the fact that this aspect of Section one speaks to the actions of the States themselves does not negate the fact that the first two aspects conferred rights which were being violated by private as well as public action.

B. The Enforcement Provisions of the 1866 Act Further Demonstrate that the Act Was Intended to Reach Private Individuals and State Officials

Like Section one, the enforcement provisions of the Act illustrate the intent of Congress to confer on the federal courts jurisdiction to redress civil rights violations regardless of their source.

The framers of the Act sought to provide for direct enforcement in the federal courts of those civil rights conferred pursuant to Section one irrespective of the states. Thus, Section two criminalizes violations of civil rights committed under color of law or custom. These criminal sanctions demonstrate the framers' intention directly to protect the civil rights of all citizens and not just to enforce equal treatment under state law.

Section three confers jurisdiction on the federal courts to enforce the rights enumerated in Section one. Section three is a key provision. It confers exclusive jurisdiction on federal district courts over "all crimes and offences committed against" its provisions. It confers concurrent jurisdiction on federal district and circuit courts over:

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11 By providing that all citizens have the same rights "as is enjoyed by white citizens," the framers intended and succeeded in preserving concurrent state regulations of these rights. As a New York Evening Post editorial noted:

> Congress does not say in this bill by what rules evidence shall be given in courts, by what tenure property shall be held, or how a citizen shall be protected in his occupation. It only says to the states, whatever laws you pass in regard to these matters, make them general; make them for the benefit of one race as well as another.

New York Evening Post, collected in *Scrapbook on the Civil Rights Bill*, Edward McPherson Papers.

> all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section [of the Act].

The foregoing provision manifests the framers' intention to confer on the courts of the United States primary civil and criminal jurisdiction over civil rights violations under Section three because of the blatant disregard of local and state courts for assaults on the persons and property of blacks and their white supporters. In addition, the framers authorized the federal courts to replace state courts and to try civil and criminal cases that the state courts would otherwise have tried whenever individuals could not enforce their rights in, or were denied their rights by, state courts. This is the import of Congressman Wilson's admonition that, since the states were not protecting the personal rights of many Americans, "we must do our duty by supplying the protection which the states deny." Cong. Globe, 39th Cong. at 1118. *See also* Senator Lane's comments *id.* at 602-03. Accordingly, Section three established a federal administration of civil and criminal justice as an alternative to that of the states when Americans needed it. R. Kaczorowski, *Politics of Judicial Interpretation*, at 7-12.[12]

Section three does not explicitly grant federal court jurisdiction to remove legal disabilities in state law or to grant injunctive relief against state officials performing or threatening to perform unconstitutional acts. The failure of Congress to confer such jurisdiction is a further indication that Congress did not merely intend to confer under the Act a right to nondiscriminatory state laws.[13]

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12 The interpretation of the Act advanced in this brief may raise questions that go beyond the issue now before the Court. Accordingly, it is unnecessary to address those questions at this time.

13 As to injunctive relief against state officials, the framers may have believed that they had an eleventh amendment problem. That the eleventh amendment does not bar injunctive relief in such cases was not fully resolved by the United States Supreme Court until forty years later in *Ex parte Young*, 209 U.S. 123 (1908). *See* Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 Colum. L. Rev. 1889 (1983); Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 Penn. L. Rev. 515 (1977). Even if the framers believed that Congress could have authorized facial challenges to discriminatory state statutes, it did not expressly grant this authority.

Since there was no general federal question jurisdiction in the federal courts until 1875, individuals may not have been able to sue in federal courts to void discriminatory state laws or to enjoin their enforcement unless Congress expressly conferred a right to do so. Therefore, individuals would have been powerless to enforce rights *under* the Act if it merely conferred a right to nondiscriminatory laws. (Of course, with the grant of general federal question jurisdiction in 1875, federal courts had sufficient jurisdiction to enforce Section one rights even if Section three jurisdiction was interpreted as requiring discriminatory state action.)

If the Act were intended merely to remove legal disabilities in state law one would expect it to have said so clearly as does Section one of the fourteenth amendment and explicitly to give federal courts jurisdiction over cases brought to remove such disabilities or to enjoin state officers from enforcing discriminatory state laws or to challenge the constitutionality of discriminatory state laws. Yet, it gives none of these causes of action and a thorough search has failed to disclose a single reported case brought under the Act to enjoin a state officer from enforcing a discriminatory statute or to challenge the constitutionality of such a statute.

The enforcement provisions of Section three evidence the framers' understanding that they were enforcing rights secured by the United States Constitution and not simply an equality in state-conferred rights. This is further demonstrated by the fact that the Act includes other enforcement provisions (*e.g.*, 9 Stat. 462 (1850)) taken from the Fugitive Slave Act of 1850 which also was enacted ironically to enforce constitutionally protected "rights of Americans, the rights of slaveholders in their slaves." Cong. Globe, 39th Cong., 1st Sess. 475 (1866) (Sen. Trumbull).

Responding to the plight of federal civil and military officers who were assisting the Southern freedmen in their transition from slavery to citizenship, for example, Section three affirmed military practice by conferring on civil and military officers of the United States a right to remove any civil suit or criminal prosecution commenced against them in any state court for actions taken to enforce the Act and the Freedmen's Bureau Act. General Orders No. 3, Jan. 12, 1866, Adjutant General Office cited in fn. 6, *supra*.

Like Section three, other provisions of the Act granted broad enforcement powers to the federal government. For example, Sections four and five authorized and required United States attorneys, marshalls, commissioners and any other officers appointed by the President to arrest and prosecute all persons who violated the Act. Section six provided criminal penalties against anyone who interfered with the enforcement of the Act. Section Nine authorized the President "to employ such part of the land or naval forces of the United States, or of the militia, as shall be necessary to prevent the violation and enforce the due execution of this act." There is no cogent explanation why Congress would have authorized the use of the military to enforce the Act in these ways if it was merely intended to remove legal disabilities. *Runyon v. McCrary*, 427 U.S. at 195 (White, J. dissenting).

The jurisdiction Congress conferred on federal courts to enforce civil rights directly evince the framers' intention to apply its authority beyond the removal of legal disabilities. Indeed, Congress could confer jurisdiction on federal courts to enforce civil rights, and not just equality under state law, only if the framers believed that they had authority to enforce the rights themselves. If the Act had only removed legal disabilities by prohibiting racially discriminatory state laws regarding state-conferred rights or by conferring a right to racially impartial state laws relating to state conferred rights, Congress could not have conferred on United States courts Section three jurisdiction to try civil actions between private parties and criminal cases, thereby enforcing the rights directly.

Under the prevailing constitutional theory of the framers' time, the remedy available was held to be coextensive with the rights conferred. *See Slaughter-House Cases*, 83 U.S. 36, 76-81 (1873); *United States v. Cruikshank*, 92 U.S. 552 (1876); *Civil Rights Cases*, 109 U.S. 3 (1883). Moreover, a statute limited to removing the legal disabilities of blacks would not have afforded protection to the civil rights of whites, and the framers were clear in expressing their intention to give whites the same protection.[14] It is simply illogical to interpret Section one as merely removing legal disabilities when Section two criminalizes certain violations of Section one rights, Section three confers on federal courts primary civil and criminal jurisdiction over cases involving these rights, and other provisions call on the armed forces of the United States to enforce the Act.

In sum, the framers of the Act understood that they were enforcing broad constitutionally secured rights of all American citizens. They left no question that they intended to apply federal authority over civil rights to private individuals. *Jones v. Alfred H. Mayer Co.*, 392 U.S. at 422-35;[15] Cong. Globe, 39th Cong., 1st Sess. at 601 (Sen. Hendricks). Neither logic nor the

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14 The framers' intention to protect whites loyal to the North is a feature of the legislation that reflects details of history peculiar to this period. Although the framers understood the need and intended to protect blacks, as blacks, from racial discrimination, they did not intend to protect whites, as whites. Rather, they understood that the need to protect whites arose from their association with the Union government either as federal officials or as political loyalists. Because these conditions no longer exist, it is hard to imagine the Act being applied to protect whites today in any way other than their being victims of racial discrimination as the Court held in *St. Francis College v. Al-Khazraji*, ____ U.S. ____, *107 S. Ct. 2022 (1987) and Shaare Tefila Congregation v. Cobb*, ____ U.S. ____, 107 S. Ct. 2019 (1987).

15 In his dissent in *Jones*, Justice Harlan insisted that the quotations from the legislative debates used by the majority as evidence of the framers' intent to reach private discrimination "are by no means contrary to a 'state action' view of the civil rights bill." 392 U.S. at 471. Justice Harlan's view is implausible, if not untenable, in light of the pervasive problems that Congress was seeking to remedy and the enforcement provisions adopted in response.

historical context within which the Act came to life support the notion that Congress intended to limit the scope of the Act so as not to reach private discrimination. The ambiguity in the Act's reach is created by subsequent misinterpretation of the statute's legislative history based on modern concepts that have no applicability in determining congressional intent in this instance.

IV. UNITED STATES JUDGES AND LEGAL OFFICERS WHO IMPLEMENTED THE CIVIL RIGHTS ACT OF 1866 INTERPRETED IT AS PROTECTING THE RIGHTS OF BOTH BLACKS AND WHITES AGAINST PRIVATE AS WELL AS STATE ACTION

Deriving congressional intent in this case is complicated by the passage of time and the evolution of our legal culture. Accordingly, the meaning and scope attributed to the Act by the judges and legal officers who were given the responsibility of enforcing it in the 1860's and 1870's is of vital importance to our understanding today.

United States judges and many state appellate courts in the 1860's and early 1870's recognized in their decisions that the thirteenth amendment and the Act extended to redress civil rights violations by private individuals. They interpreted the thirteenth amendment as a delegation to Congress of authority to secure liberty and the fundamental rights of which it consists. *United States v. Rhodes*, 27 F. Cas. 785, 793 (C.C.D. Ky. 1867) (No. 16, 151); *In re Turner*, 24 F. Cas. 337, 339 (C.C.D. Md. 1867) (No. 14, 247); *Slaughter-House Cases*, 15 F. Cas. 649, 652-53, 655 (C.C.D. La. 1870) (No. 8, 408), *rev'd*, 83 U.S. 36 (1873); *In re Hobbs*, 12 F. Cas. 262, 264 (C.C. N.D. Ga. 1871) (No. 6 550); *United States v. Given*, 25 F. Cas. 1324, 1325 (C.C.D. Del. 1873) (No. 14, 897). *See also People v. Washington*, 36 Cal. 658, 664-65 (1869), *overruled*, *People v. Brady*, 40 Cal. 198 (1870), *overruled*, *Van Valkenburg v. Brown*, 43 Cal. 43 (1873); *Smith v. Moody*, 26 Ind. 299, 307 (1866).[16]

16 For the most complete discussion of civil rights enforcement in the federal courts during Reconstruction, see Kaczorowski, *Politics of Judicial Interpretation: The Federal Courts, Department of Justice and Civil Rights* (1985).

Federal courts upheld the Act's constitutionality; interpreted it as securing the fundamental civil rights enumerated in Section one and not merely as removing legal disabilities; applied it in cases involving private discrimination; and distinguished between discriminatory state law and custom by enforcing the statute against discriminatory custom in the absence of discriminatory state law.[17]

For example, in *Stevens v. Richmond, Fredricksburg & Potomac Railroad Co.*,[18] a South Carolina black woman and her husband successfully sued a railroad under the Act for barring her from riding on the first class car even though she had a first class ticket. She was returning to her home in Charleston, South Carolina from New York and had been riding in the first class car until the train crossed into Virginia. In Richmond, she was forcibly removed to a car designated for black passengers. A jury found that the railroad had violated her rights under Section one of the Act and awarded her $1,600 in damages.

Judges also interpreted the language of Section one, "as is enjoyed by white citizens," not as a grant of equal rights under state law but rather as requiring state regulation of the exercise of rights secured by Section one to be racially impartial. *United States v. Rhodes*, 27 F. Cas. 786, 788 (C.C.D. Ky. 1867); *Peo-*

17 *See, e.g., In re Turner*, 24 F. Cas. at 337 (apprentice contract); Charge to Grand Jury, reported in newspaper, see fn. 20, Underwood Scrapbook; Charge to Grand Jury reported in unidentified newspaper enclosed in Judge R. A. Hill to B. H. Bristow, July 28, 1871, source chronological file (N.D. Miss.), Record Group 60, National Archives; report of indictment under the Civil Rights Act of the proprietors of the Davis Avenue Railroad in Mobile, Alabama for refusing to carry black passengers, newspaper clipping collected in *Scrapbook on the Civil Rights Bill*, at 136. *See also* clippings of Baltimore American, Apr. 16, 1866, *id.* at 109; Detroit Post, Sept. 14, 1866, Underwood Scrapbook *id.* at 120; Philadelphia Daily News, Apr. 23, 1866, *id.* at 109, 110-11; unidentified newspapers collected in *id.* at 108, 119, 136; Cincinnati Gazette, July 4, 1867, at 1; N.Y. Times, May 14, 1871, at 1; Correspondence Relative to Reconstruction, S. Exec. Doc. No. 14, 40th Cong., 1st Sess. 208-09 (1867).

18 This case is reported in newspaper accounts collected in Scrapbook 193, 203, 205, 227 (John C. Underwood ed. n.d.) (Judge John C. Underwood Papers Library of Congress).

ple v. Washington, 36 Cal. 658, 666-67, 669-70 (1869), *overruled*, *People v. Brady*, 40 Cal. 198 (1870), *overruled*, *Van Valkenburg v. Brown*, 43 Cal. 43 (1873).

Federal judges and legal officers also interpreted the Act as securing the rights of whites as well as blacks. *Id.* at 793; *Slaughter-House Cases*, 15 F. Cas. at 655; Adjutant General Holt to Secretary of War, June 18, 1866, Letters Rec'd by the Comm. of the Freedmen's Bureau; N.Y. Times, July 14, 1866 at 8. State appellate courts similarly interpreted the intended scope of the Civil Rights Act as reaching whites. *People v. Washington*, 36 Cal. 658, 672-98 (Crockett, J. dissenting), *overruled*, *People v. Brady*, 40 Cal. 198, *overruled*, *Van Valkenburg v. Brown*, 43 Cal. 43; *Smith v. Moody*, 26 Ind. at 307; *People v. Rash*, 1 Houst. Crim. Cases 271 (Del. Ct. Gen. Sess. 1867); *Bowlin v. Commonwealth*, 65 Ky. 5 (1867). *See also* Kaczorowski, *Politics of Judicial Interpretation*, at 4-7.

The United States Attorney and District Court Judge for Kentucky, in conjunction with the Freedmen's Bureau, until 1868 undertook the burden of the prosecution and administration of cases involving white defendants accused of crimes against blacks under Section three because the testimony of blacks was not admitted in the courts of the state. *Id.* at 34. Significantly, neither the United States Attorney nor any black citizen of Kentucky challenged the legality of the state's evidence rules in federal court under the Act relying instead on the jurisdictional provisions of Section three to secure the fair administration of criminal justice.

The United States Supreme Court upheld the constitutionality of the Act in 1872. *Blyew v. United States*, 80 U.S. 581 (1872). Although it eliminated federal jurisdiction to try whites accused of having committed crimes against blacks because the black victims of these crimes were not persons affected by the prosecutions, it interpreted the Act broadly in other respects. It declared that it was "well known" that the Act was intended to protect blacks from "prejudices [that] existed against the colored race, which naturally affected the administration of justice in the state courts, and operated harshly when one of that race

was a party accused." *Id.* at 593. The Court also interpreted the Act as conferring the rights enumerated in Section one, not just removing legal disabilities, and as securing the civil rights of whites as well as blacks when it declared that the Act "extends to both races the same rights, and the same means of vindicating them." *Id.*

Agents of the Freedmen's Bureau enforced civil rights under authority of the Act and similar civil rights provisions of the Freedmen's Bureau Act of July 1866, regardless of whether state laws discriminated or were facially impartial.[19] They were instructed to enforce the Act when local authorities "failed, neglected, or were unable to arrest and bring ... to trial" persons who committed crimes. Violations of the Civil Rights Bill, S. Exec. Doc. No. 29, 12-13, 39th Cong., 2d Sess. (1867). Agents prosecuted state officers who enforced discriminatory statutes. Kaczorowski, *Politics of Judicial Interpretation* at 37-38. They also prosecuted private individuals when state law enforcement agencies and courts failed to bring defendants to justice for crimes committed against blacks. *Id.* at 38, 46, n. 24. These cases were referred to military tribunals or federal courts depending upon the seriousness of the crime.

Accordingly, the history of civil rights enforcement by the courts of the day and by the Freedmen's Bureau clearly establishes that the Act was viewed as extending to and prohibiting discriminatory actions of private individuals and entities as well as public officers.

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19 Letter from U.S. District Judge Robert A. Hill to Gen. C. Gillenm, Feb. 26, 1867, Records of the Ass't. Comm. of the Freedmen's Bureau for Mississippi; Capt. Jas. W. Sunderland to Maj. A. W. Preston, Feb. 6, 1867, *id.*; Letter from Allan Rutherford to Gen. John Robinson, Nov. 1, 1866, Letters Rec'd by the Comm. of the Freedmen's Bureau; Letter from Lt. W.S. McCullough to Capt. D.H. Williams. May 27, 1867, Records of the Ass't. Comm. of the Freedmen's Bureau for Arkansas; Kaczorowski, *Politics of Judicial Interpretation*, at 27-48.

CONCLUSION

The conditions that existed in the post-war South, which gave rise to adoption of the Act, the language of the framers and the scope of enforcement by those immediately responsible for redressing civil rights violations under the Act all lead to but one inescapable conclusion: the framers of the Act intended, *inter alia*, to prohibit certain forms of private activity. Accordingly, the holding in *Runyon v. McCrary*, 427 U.S. 160, 96 S. Ct. 2586 (1976) is in accord with the framers' intent, and reconsideration by this Court of that holding is unwarranted and unwise.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-107

BRENDA PATTERSON,

Petitioner,

—against—

McCLEAN CREDIT UNION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

CONSENT TO FILING OF BRIEF *AMICUS CURIAE* BY ERIC FONER, JOHN H. FRANKLIN, LOUIS R. HARLAN, STANLEY N. KATZ, LEON F. LITWACK, AND C. VANN WOODWARD

We, Brenda Patterson and McClean Credit Union, who are all the parties to the above-entitled cause, herein consent, by our respective counsel of record, to the filing of a brief *amicus curiae* by Eric Foner, John H. Franklin, Louis R. Harlan, Stanley N. Katz, Leon F. Litwack, C. Vann Woodward, pursuant to Rule 36(2) of the Rules of this Court.

Dated: New York, New York
June 22, 1988

/s/ CHARLES STEPHEN RALSTON/PDH
Charles Stephen Ralston

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APPENDIX B

Mary Frances Berry is, Geraldine R. Segal, Professor of History, University of Pennsylvania, Post Chancellor and Professor of History and Law at the University of Colorado. She has authored books and articles in the field of American Legal History, especially the history of civil rights, the Civil War and Reconstruction. She is a member of the United States Commission on Civil Rights. She has served as Assistant Secretary of Education in the Department of Health, Education and Welfare. She is a past Vice President of the American Historical Association and is President-Designate of the Organization of American Historians.

Eric Foner is Professor of History at Columbia University. He has authored several books on United States political history, including the period of Reconstruction following the Civil War. He has been a fellow of the Guggenheim Foundation and the American Council of Learned Societies.

John H. Franklin is James B. Duke Professor of History, Duke University, and Professor of Legal History, Duke University Law School. He has published many books and articles on the history of black Americans, equality, and the period of reconstruction. Professor Franklin has served as president of several scholarly organizations, including the American Historical Association, the Organization of American Historians, the American Studies Association, and Phi Beta Kappa. He is a Fellow in the American Academy of Arts and Sciences and has been a Fellow of the Guggenheim Foundation. He has received numerous honorary degrees.

Louis R. Harlan is Distinguished Professor of History at the University of Maryland. He has written extensively on the subject of Afro-American history. His biography of Booker T. Washington received the Pulitzer Prize, Bancroft Award, and the Beveridge Award. He is the editor of the multi-volume publication of the papers of Booker T. Washington. Dr. Harlan has served on the executive boards of the Southern Historical Association and the Association for the Study of Afro-American Life and History. He has been a fellow of the American Council of Learned Societies, the Guggenheim Foundation, the Institute

for the Advanced Study in the Behavioral Sciences, and the Society of American Historians.

Stanley N. Katz is President of the American Council of Learned Societies. The academic positions he has held include Class of 1921 Bicentennial Professor of the History of American Law and Liberty, Princeton University, and Professor of Law, University of Chicago Law School. He is a member and editor of the Oliver Wendell Holmes Devise History of the United States Supreme Court, and he has served as president of the Organization of American Historians and the American Society for Legal History. His administrative positions have included associate dean of the University of Chicago Law School, chairman of the American Bar Association Commission on Undergraduate Education in Law and Humanities, and Chairman of the Council on International Exchange of Scholars. He has written and edited several books and articles on United States history.

Leon F. Litwack is Professor of History at the University of California at Berkeley. He has also been a Fulbright Professor of American History in the Soviet Union and a visiting lecturer in the People's Republic of China. He has written extensively on the subjects of slavery and Afro-American history. His latest book on the experience of the freedmen during Reconstruction was awarded the Pulitzer Prize in history and the American Book Award. He has served as President of the Organization of American Historians, and he has been a fellow of the Guggenheim Foundation, the Rockefeller Foundation, the Social Science Research Council and the Henry E. Huntington Library.

C. Vann Woodward is Sterling Professor of History, emeritus, Yale University. He has also lectured on American history at Oxford University and the University of London. He has written extensively on the history of the South. His books have been awarded the Pulitzer Prize for history, the Bancroft Prize, the National Institute of Arts and Letters Literary Award, and the American Council of Learned Societies Prize. He has served as president of the American Historical Association, the Organization of American Historians, and the Southern Historical Association. He has also been a Guggenheim Fellow.